No. ....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HURON HOLDING CORPORATION,
a corporation,

Appellant,

vs.

LINCOLN MINE OPERATING COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

WILLIAM H. LANGROISE,
ERLE H. CASTERLIN,
SAM S. GRIFFIN,
Boise, Idaho,
Attorneys for Appellee.

JESS HAWLEY,
OSCAR W. WORTHWINE,
Boise, Idaho,
Attorneys for Appellant.

....Clerk.

Filed..

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BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

STATEMENT OF CASE.

This is an action for claim and delivery of personal property under the Idaho statutes, originally brought in the State court by the Lincoln Mines Operating Company, a corporation, against Manufacturers Trust Company, a corporation, Alexander Lewis and Fred Turner. The Manufacturers Trust Company caused the removal of the cause to the Federal court. After removal the Huron Holding Corporation, a corporation, was made a party defendant. (211-39).

Alexander Lewis had died prior to bringing the action. Fred Turner disclaimed. The cause was then tried to a

jury upon the issue framed by plaintiff's Amended Complaint (Tr. 22-36), and the Answer of the Huron Holding Corporation (Tr. 45-48), and the Answer of the Manfacturers Trust Company. The cause was dismissed as to the Manufacturers Trust Company upon its motion made after all parties had rested (Tr. 54), and the issues were finally submitted as between the Lincoln Mines Operating Company and the Huron Holding Corporation.

A verdict was returned in favor of the plaintiff and against the last remaining defendant, and damages were assessed in the sum of $6730.00. (Tr. 55). Judgment was entered accordingly (Tr. 56-57), and from the Judgment the Huron Holding Corporation appeals to this court.

STATEMENT OF FACTS.

Exhibit "A" attached to the Amended Complaint (Tr. 26-36) sets forth the personal property claimed by the Lincoln Mines Operating Company, hereafter called the Operating Company, which it is alleged the Huron Holding Corporation, hereafter called the Holding Corporation, unlawfully detained to plaintiff's damage in the sum of $55,000.00, its value, and also damages for its detention.

The Holding Corporation abandoned its defenses of abandonment of the property by the Operating Company and of the statute of limitations. (Tr. 60,111).

It was agreed that the personal property of the Operat-

ing Company was by it left on the group of claims known as the Lincoln Mines; that the property described in the Harvey Inventory, so-called, includes the personal property of the Operating Company as well as that of the Ojus Mining Company and that of the owners of the claims whoever they might be. (Tr. 110-111).

It was agreed that on April 25, 1933, Jess Hawley, one of the attorneys for the defendant, put Gordon Smith in charge of the Lincoln Mines claims for the owners thereof, and that under the latter's direction one W. A. Harvey, between April 27th and May 8th, 1933, made an Inventory of the personal property then on the mining claims. This Inventory is the Harvey Inventory admitted in evidence as Exhibit No. 1 (Tr. 49-58).

Exhibit No. 12, admitted in evidence (Tr. 86-103) is a copy of the Harvey Inventory from which has been stricken, and on which is indicated, the personal property owned by the Ojus Mining Company and that owned by the owners of the claims, so that which remains uncancelled from Exhibit No. 12 is the property of the Operating Company. (Tr. 71-80).

Alexander Lewis held at all times, and in his name now rests, the legal title to the mining claims (Tr. 52). The personal property owned by Alexander Lewis on June 15, 1932, shortly before the Harvey Inventory was made, is set forth in Exhibit No. 8 admitted in evidence (Tr. 66), and by means of this Exhibit it was possible to eliminate the personal property of the owner of the

claims from Exhibit No. 12 (Tr. 71). There is no dispute in the evidence as to this point, and no question was made respecting the point.

Elmer Fox, Auditor of the Operating Company who made its periodic audits until December 10, 1929 (Tr. 70), was able, and did without question, remove from Exhibit 12 the personal property of the Ojus Mining Company, and identify the property of the Operating Company (Tr. 71, et seq.).

William I. Phillips positively identified the personal property of the Operating Company contained in Exhibit No. 12 (Tr. 84, et seq.). He was President of the Company, lived at the mine where the personal property is located from June, 1932 to February, 1933, and was himself operating the mine and using the personal property.

Thus, both by absolute identification and by elimination, and we might say by agreement, the personal property involved in this suit is definitely set forth in Exhibit No. 12, set forth at pages 86-103 of the Transcript. Neither Elmer Fox nor William I. Phillips was cross examined respecting the identity of the personal property, and no evidence was offered by the defendant to contradict the testimony of these witnesses.

The property of the Operating Company having been identified, the Holding Corporation admits the unlawful detention thereof from June 4, 1936, to October 15, 1937, and those dates were accepted by the Operating Company. (Tr. 59-60, 67-68-69, 110-111).

The Holding Corporation further admitted that the Operating Company is "entitled to recover the property which belongs to the plaintiff, together with such damages as the court will instruct the jury on that point." (Tr. 67). It is also conceded in the appellant's brief (p. 51) that "we should be subject to some type of penalty, because we denied possession, whether that brought about any actual damages or not, but to penalize the appellant so heavily * * * is going too far".

No witness testified as to the value of all of the property of the Operating Company described in Exhibit No. 12, but the value of such part thereof as was appraised by the appellee's witnesses was fixed at $16,949.68 (Tr. 113-117) The appellant's witnesses testified only as to value of certain motors, and never attempted to put a value on any of the other property. The property appraisd by the appellant was lower in value by the sum of $1889.10 than the appraisement of the appellee. Therefore, the undisputed value of such property as was appraised, not being all of that contained in Exhibit No. 12, is the sum of $15,060.58.

Appellee's witnesses also set the rental value of the property appraised at $18,460.64 for the entire period of detention, while appellant's witnesses on the property covered by their testimony put on a rental value lower by $3264.00. Therefore, the undisputed rental value for the period of detention is the sum of $15,196.64. It requires an analysis of the testimony to arrive at these figures. The result of such analysis is as given.

The jury found for the plaintiff appellee, but neither described the property nor placed a value on it. It did fix the damages in the sum of $6730.70. (Tr. 50-51).

ARGUMENT

The majority of assignments of error are not properly before this Court and not subject to review on appeal.

Assignments 1 and 2 (Tr. 198-199) relating to service of summons are not arguable herein, since no Bill of Exceptions with respect thereto is contained in the record. The proceedings and evidence with respect thereto, and with respect to whether the appellant, foreign corporation, was doing business in Idaho, is specifically excepted from the record as evidenced by the trial court's certificate that the record does not include:

> "proceedings, evidence, or bill of exceptions upon hearing of motion to quash service of summons and/or dismissal, or with respect to service of summons, jurisdiction or doing business. (Tr. 194)

Upon presentation of the motion to quash summons it was stipulated that the same is submitted for decision upon "the records and files of said cause, including affidavits" of five individuals, and including "all relevant and material exhibits, depositions, testimony and Bill of Exceptions" in a separate action of record in the trial court, "the same being in the records and files of this court, all of which foregoing shall be deemed to have been admitted in evidence or testified to in this cause" in support of or against said motion (Tr.43).

The affidavits of the five individuals are not included in the record, and there is no way to ascertain what part of the exhibits, depositions and testimony in the case mentioned in the stipulation was before the lower court and considered by it.

Though time was granted within which to prepare Bill of Exceptions on overruling of motion to quash (Tr. 44), no such Bill was prepared or settled within such time, or at all, nor is such a Bill included in the record on appeal.

It has been held by this Court that a Bill of Exceptions is indispensible to review rulings upon motions based upon affidavits or evidence, and none is here presented.

Beach vs. U. S. (CCA 9) 35 Fed. (2d) 837
Wolfe vs. U. S. (CCA 9) 64 Fed. (2d) 566. 567
Reynolds vs. U. S. (CCA 9) 67 Fed. (2d) 217
Laulee, et al. vs. U. S. (CCA 9) 67 Fed. (2d) 156

Assignment 4 relating to sufficiency of evidence was not preserved by motion to dismiss, for non-suit, for directed verdict on that ground, or otherwise. (Tr. 177). At the close of all the evidence appellant moved for a directed verdict only on the grounds that (a) the defendant had not been properly served with summons; (b) the defendant had never been in the jurisdiction of the court; (c) the defendant has not been doing business in the State (Tr. 177). The trial court's attention was not directed to the sufficiency of the evidence by any motion or otherwise.

In Stubbs vs. U. S. (CCA 9) 1 Fed. (2d) 837, 839,

this court stated: "There was no challenge to the sufficiency of the testimony to support a conviction during the trial by motion for a directed verdict or otherwise, and, as a general rule, that objection cannot be raised for the first time by motion for a new trial or in the appellate court. * * * This case forms no exception to the rule."

For a statement of the same rule in this court, see:

Moore vs. U. S., 1 Fed. (2d) 839
Utley vs. U. S., 5 Fed. (2d) 963
Murphy vs. U. S., 35 Fed. (2d) 1019

To properly permit a review of the sufficiency of the evidence to sustain the verdict, a motion for an instructed verdict must be made at the close of the testimony. This was not done here on the ground of insufficiency of the evidence, but was limited to improper service of summons, and the record on that point is not before this court.

Sharples Separator Co. vs. Skinner, (CCA 9) 251 Fed. 25, 27

Continental Nat. Bank vs. Neville, (CCA 9) 285 Fed. 565

United Verde Copper Co. vs. Jaber, (CCA 9) 298 Fed. 97

Assignments 5 and 6 relate to alleged refusal to give requested instructions, and to the giving of certain instructions. We have searched the record on this appeal in vain to find where and when appellant requested any instructions to be given by the court, and to find when and where and upon what grounds the appellant objected to, or reserved exceptions to, the instructions given by the

court. The record is absolutely silent on these two points; the Bill of Exceptions shows no objection or exception to instructions given, and no instructions whatever requested and under the decisions of this court the assignments Nos. 5 and 6, wherein for the first time appear claimed requests and error in instructions given (Tr. 210-216) cannot be reviewed.

In Royal Finance Co. vs. Miller, 47 Fed. (2d) 24, 27, this court, speaking through Wilbur, J. states:

> "The exception to this instruction does not state the ground of the exception as is required of a party in order to present such objections to this court. * * *
>
> "Exceptions to this rule have sometimes been made, where, by reason of requested instructions or otherwise, it is clear that the court was reasonably advised as to the grounds of the exception. * * *
>
> "The exceptions taken to the instruction do not point out the fact that the court has stated, apparently by inadvertence, two inconsistent rules for measuring the responsibility of the appellant. * * *

In the same case, the purpose of the rule is given as follows:

> " * * * the purpose of the rule being to inform the court of the exact nature of the contention of the appellant in order that the court may intelligently pass upon such an objection and modify or withdraw instructions which have been erroneously given. * * * "

Assignment 7 relates to verdict and judgment. The record contains no objection or exception to the form of verdict or to the judgment. (Tr. 55-56). Obviously, the

trial court should have been advised of any claimed deficiencies or irregularities in the verdict at the time the jury made its return, and before discharge of the jury so that correction could be made. Furthermore, the court, in instructions, called attention to the proposed form of verdict and its content (Tr. 193), and appellant made no objection, preserved no exception thereto, and requested no instruction thereon. The objection for the first time on appeal, and especially, as hereinafter pointed out where appellant is not prejudiced, is too late, and presents nothing for review by this court.

In Knollin vs. Jones, 7 Ida. 466, 63 Pac. 638, the appellant assigned as error the vagueness of the verdict in a claim and delivery suit. At page 474 of the decision, the court states that it is unnecessary to discuss the assignment that the verdict is too vague to support the judgment because the question was not raised before entry of judgment, and it came too late. The appellant here never objected to the form of the verdict in the trial court before judgment entered and the verdict can be understood. To the same effect are:

Boomer vs. Isley, 49 Ida. 666, 290 Pac. 405
Pedersen vs. Moore, 32 Ida. 420, 184 Pac. 475
Campbell vs. First Nat. Bank, 13 Ida. 95, 88 Pac. 639
In Re Hellier's Estate 169 Cal. 77, 145 Pac. 1008
38 Cyc. 1904
24 Cal. Jur. 895
2 R. C. L. 86, Sec. 62
27 R. C. L. 853, Sec. 26

ASSIGNMENTS 1 AND 2 (TR. 198-9)

There is sufficient showing of doing business and proper service.

We have heretofore pointed out that these assignments are not reviewable on appeal for want of the record relating thereto.

Appellant does not argue, and hence concedes, that if it was doing business in Idaho it was properly served and the court had jurisdiction. Notwithstanding that the complete evidence and record upon this question are not before this court, evidence in the record primarily with respect to other matters is in itself sufficient to show that appellant was doing business in Idaho. It shows that appellant corporation, and its predecessors, foreign corporations not complying with the laws of Idaho (Tr. 58), attempted to hold, and did operate, real and personal property (the Lincoln Mines) under the name and subterfuge of an individual, Alexander Lewis (Tr. 60-65), who over a period of years from 1926 executed leases thereon, under which active mining was carried on, and out of which active and general mining the owner received royalties (Tr. 65-69, 81, 85, 105-107, 110). New claims were discovered, located and patented, necessary work therefor being done (Tr. 66-67). After the termination of leases in 1933 and to the present, the appellant caused to be done cross-cutting, drifting, and general mining work (Tr. 68-69, 107-110, 161).

That it was doing business in Idaho is so clear as not

to require argument or citation of authority. The cases cited by appellant relate to acts outside the State.

See Boise F. Service vs. General Motors Acc. Corp., 55 Ida. 5; 36 Pac. (2d) 813

John Hancock Mut. L. Ins. Co., vs. Girard, 57 Ida. 198; 64 Pac. (2d) 254

Hoffstater vs. Jewell, 33 Ida. 439; 196 Pac. 194

ASSIGNMENT 3 (TR. 199)

Present existence of an outstanding mortgage did not appear, and even if outstanding was irrelevant and immaterial.

For number 3 appellant assigns as error the refusal to admit in evidence a certain chattel mortgage set forth at page 200 of the Transcript, and the assignment thereof immediately following.

In an action in claim and delivery the right to possession is the main issue; and in the instant action the right to possession is admitted.

Cunningham vs. Stoner, 10 Ida. 549, 79 Pac. 228

Commercial Credit Co., vs. Mizer, 50 Ida. 388, 296 Pac. 580

Preston A. Blair Co., vs. Rose, 56 Ida. 114, 51 Pac. (2d) 209

In Idaho a mortgagee has merely a lien to secure payment of a debt, and the possession remains in someone else.

Forbush vs. San Diego Fruit & Produce Co., 46 Ida. 231, 266 Pac. 659

By virtue of Section 44-811 Idaho Code, 1932, a debt secured by a mortgage carries with it the security.

Therefore, the existence of the chattel mortgage on the personal property could not affect the right of the appellee to possession and use of the security and the naked chattel mortgage without the possession and ownership of the debt secured could affect the situation in no way. The ownership of the debt secured determines the right to the mortgage and the debt secured, being the promissory note described in the mortgage, was not offered in evidence, and so far as the record is concerned its ownership is unknown. It might be in possession of the mortgagor and paid.

No offer was made by appellant to show, and it does not appear, that there was, either at the time of unlawful detainer in 1936 and 1937 or at the time of trial, an unpaid debt secured by the mortgage, or an outstanding mortgage lien. Merely presenting a mortgage executed in 1927, security for a debt due in 1929, and without offering proof that the debt was unpaid, raised no presumption that the debt was unpaid in 1936, 1937 or 1938, and the mortgage still a lien. If there was to be any presumption it should be that the debt secured was paid when due, i.e., January 1, 1929, and this particularly because, being then due, on the face of the record the statute of limitations had run and become absolute.

The assignment (Tr. 206-210) does not purport to assign the debt secured, and there is no evidence that

there ever was an assignment of the promissory note. In any event, assignee Helen S. Pearson makes no claim to the debt secured, and the debt secured cannot be enforced as it is barred by the statutes of limitations. Section 5-216 Idaho Code, 1932. The mortgage was properly rejected as evidence.

Appellant apparently labors the point that since there may have been an outstanding chattel mortgage, appellee could not under Idaho statutes remove, sell or rent the property without consent of the mortgagee. But it is conceded appellee was entitled to possession. There is no statutory or other prohibition on use of the property by appellee; no prohibition on renting the property. It was under the statute cited removable from the property of appellant and within the County without penalty, and without consent. It was removable from the County without consent and usable therein, and was saleable and rentable after such removal, and without consent, the statute not declaring such acts void, but only that the mortgage is unaffected (Sec. 44-1007), and if *both* removal and sale had, imposing a criminal penalty upon the mortgagor (Sec. 17-3907; State vs. Olsen, 53 Ida. 546, 26 P. (2d) 127).

In other words, the mortgagor may validly remove, use, sell and rent within or without the County. If done without consent of mortgagee, and without the County, a sale (and use, possession or renting) is valid, but subject to the mortgage, and (assuming validity of the criminal statute; very doubtful with its omissions of Chapter and

Title) in case of sale the mortgagor may be criminally prosecuted.

Furthermore, it was not necessary to have consent to remove from appellant's unlawful possession—all that appellant is interested in. Where mortgagor took, or what he did with, the property, or what personal penalty appellee might be subject to, are immaterial, irrelevant and no concern of appellant. It makes its unlawful detainer no less unlawful; it does not minimize appellee's damage.

And appellant was under no duty to hold the property for the mortgagee, nor inquire as to consent. Nor was appellee burdened with proof of consent, having full legal right of control and use of the property. If a defense, it was appellant's burden to prove want of consent.

Appellant at the trial conceded and so advised the trial court, that these exhibits were not admissible, except upon the one issue of value of the property (Tr. 112-113). It did not even argue, as it does now, its admissibility upon value of use or rental value; and it does not argue now that they had any relevancy on value of the property. Appellant thus shifts ground, and having concurred with the trial court is estopped to urge an entirely new ground not presented to the trial court.

The mortgage and assignment were irrelevant and immaterial for any purpose, or upon any issue.

ASSIGNMENT 4 (TR. 210)

Is not before the Court; there was evidence to sustain the verdict and judgment.

We have heretofore pointed out that no motion was made at the trial which preserved for review the matter of sufficiency of evidence.

The assignment limits the alleged lack of substantial evidence only with respect to part of the property unlawfully detained, i.e., mine and mill machinery. The assignment concedes sufficiency therefore with respect to all other property. Since the damages allowed by the jury are not set forth separately as to the various properties, appellant cannot argue that the jury did not, in fact, eliminate, as appellant seeks to do, the items about which there is claimed to be insufficient evidence. The fact that the jury did not allow the full amount claimed and testified to, indicates that it used discrimination in this respect. There being substantial evidence to sustain the verdict and judgment in the case as a whole does not permit reversal because upon some one item of the whole there may have been no evidence at all.

Under assignmet number 4 it is stated that there is no *substantial* evidence that the property could have been rented or used during the unlawful detention. This admits the existence of some evidence, and the jury has passed upon the same. The assignment is also predicated upon the theory that before rental or use value can be the measure of damages it must be proved that there was either actual rental or use of the property.

Plaintiff was entitled to the usable value regardless of whether or not it be shown to have hired other property to take its place, or to have rented the same.

Stanley W. Smith Inv. vs. Pilgrim, 117 Cal. App. 244, 3 Pac. (2d) 573

Ferris vs. Cooper, (Cal.) 13 Pac. (2d) 536

Damages are not confined to interest if the value of the use exceeds the interest.

Nahhas vs. Browning, 181 Cal. 55, 183 Pac. 442, 6 A. L. R. 476

The reason for the rule is simple. If the interest is less than the usable value, the wrongdoer would profit by his wrong doing if permitted to claim the interest on the investment rather than the rental value as the basis for damages. Mr. Arnold testified that the reasonable market rental value of that type of equipment is ten per cent of the value of the equipment per month (Tr. 147).

Mr. Parsons testified that ten per cent per month of the depreciated value of the equipment, meaning the value when it goes out, is the rental value of such property. (Tr. 119, 120). Both Mr. Arnold (Tr. 146-147) and Mr. Parsons (Tr. 113-117) were qualified to testify to the rental or usable value of the property as well as the actual value of the property.

The appellant called William A. Hopper as its witness to testify as to the value of the motors only. Although he was qualified to testify as to rental value (Tr. 157), he was never asked for that information. He was the only witness qualified to dispute the testimony of Arnold and Parsons, and he did not question the testimony of the appellee's witnesses. Therefore, the evidence as to rental

value is undisputed and all allowances for difference in sale value have been explained and granted above.

And it may be pointed out that appellant should not be heard to complain that rental value was testified in an amount exceeding value, since the jury in fact allowed only about one-third of such sum. The jury may also have allowed, under the instruction of the Court (Tr. 189-90) rental on some items, allowed interest on others, and rejected others entirely, particularly those on Exhibit 12 and not described in the complaint. It was a matter peculiarly within the province of the jury, and it is useless to speculate as to the manner or method by which they arrived at their conclusions since the fact remains that their verdict was within the limits shown by the evidence, and is sustained thereby.

ASSIGNMENT 5, (TR. 210)

Is not before the Court; the alleged requested instructions were erroneous, or covered by the trial court's instructions.

We have hereinbefore pointed out that the Bill of Exceptions shows no requested instructions nor exceptions for failure to give requests. They are not, therefore, before this court for review.

There was no error in refusing to direct a verdict for the Holding Corporation. The motion for a directed verdict (Tr. 177) was on the ground that the defendant had not been properly served with summons, and that the court did not have jurisdiction of the defendant. As already

pointed out, the record does not contain all of the proof before the court on this matter, and the appeldant is in no position to have the question reviewed on appeal.

Appellant does not press as error refusal to give requested instructions numbered 5 and 8 (Tr. 211), and we pass them. Instructions numbered 10 requested by appellant (Tr. 212) is not a correct statement of law, because it would preclude the plaintiff from recovering the rental value of the property, unless it had ability to use or rent the same, although the defendant may have used the property. In other words, if the plaintiff could not have used or rented the property the defendant would be liable only for the interest on the value of the property, although it might have saved money by not renting the same or other property.

This rule of law would permit the defendant to profit by its own wrong, and that is not the purpose or the intent of the rule of damages as previously stated. The court's instruction covered this matter (Tr. 189-90).

As counsel frankly states in the brief at page 41, "the main point in our attack—the appellee was not damaged actually by the detention of the property because it could not have actually used it or rented it." Appellant quotes from 8 Ruling Case Law, pp. 487-489 (Bried, p. 40),—"Ordinarily the measure of damages for the loss or destruction of property * * *" which does not apply in the instant case because none of the property is shown to have been either lost or destroyed. The contention is over the rental value, not the market value of the property.

While ordinarily interest on the value of the property may be the measure of damages, nevertheless "damages in a replevin suit for wrongful taking and withholding of the property are not confined to interest if the value of the use of the property exceeds the interest." 5 Cal. Jur., p. 207. This was the rule in Nahhas vs. Browning, 181 Cal. 55, 6 A. L. R. 476, 183 Pac. 442. It is also said in Crawford vs. Meadows, 55 Cal. App. 4, 203 Pac. 428, "But where the property has a usable value which exceeds the lawful rate of interest this rule (of interest on market value) has no application". To the same effect is Ruzanoff vs. Retail Credit Ass'n., 97 Cal. App. 682, 276, Pac. 156.

> "Where, however, the property has a usable value which exceeds the lawful rate of interest, the successful party is entitled to recover as damages for the detention, the reasonable value of such use during the period that he was wrongfully deprived thereof * * *. The reason for this rule is that interest or the value of the property does not furnish adequate compensation for the wrongful detention. If recovery were limited to those items, the wrongdoer who has had the use of the property would often make a profit out of his own wrong, which the law does not tolerate; and the sufferer would be denied damages which naturally and certainly follow from the wrongful invasion of his rights. This value is to be *estimated* by the ordinary market price of the use of the property—in other words, the rental value."

5 Cal. Jur., 208

Mutch vs. Long Beach Imp. Co., 47 Cal. App. 267, 190 Pac. 638

Gustafson vs. Byers, 105 Cal. App. 584, 288 Pac. 111

Drinkhouse vs. Van Ness, 202 Cal. 359, 260 Pac. 869

Blodgett vs. Rheinschild, 56 Cal. App. 728, 206 Pac. 674

"In an action for claim and delivery of personal property, the party aggrieved is entitled to the usable value regardless of whether or not he be shown to have hired other property to take its place."

Stanley W. Smith vs. Pilgrim, 117 Cal. App. 244, 3 Pac. (2d) 573

Ruzanoff vs. Retailers Credit Assn., 97 Cal. App. 682, 276 Pac. 156

Appellant cites Blackfoot City Bank vs. Clements, 39 Ida. 194, 226 Pac. 1079, in support of the rule that the damages are measured by legal interest on the valuation of the property. In this case, the property involved were ewes with young lambs or lambing, and that property had no usable value. Therefore, the interest on the value would be the measure of damages. In this same case, the Idaho court says, in substance, that because of the facts and circumstances "of a case of this nature" there is no fast rule for proving value; and the only available market would be at or near the vicinity where the sheep were because they were ewes with young lambs or lambing. And so in the instant case, because mining machinery and equipment can only be rented or used where there are mines, there is some difficulty in proving and no fast rule for establishing the value or the usable value of the particular property. Appellant concedes (Brief, pp 41, 42) that both requested instructions numbered 10 and 11 are

susceptible of a construction which would make them improper.

In Tannahill vs. Lydon, 31 Ida. 608, 610; 173 Pac. 1146, the trial court instructed the jury that "the measure of plaintiff's damage herein is the value of the property so wrongfully taken at the time of the taking, with reasonable value of the use of the said mare from the time of the taking to this date." The mare had not been returned, nor the period of unlawful detention otherwise terminated. The court held the instruction not erroneous "because not accompanied by considerations of whether the property could have been constantly employed by plaintiff at a given rate of earnings by letting for hire, or by employment at home."

The Supreme Court of Idaho stated that "the instruction as given had been repeatedly approved by this court." (Page 611 of the report). In commenting on the amount of the rental value the court said:

> "It may well be that where property has usable value, the damages resulting from wrongful detention if the property is detained long enough will far exceed the actual value of the property detained, and the owner of the property, if entitled to possession, is also entitled to whatever damages he sustains by being deprived of that possession."

And continuing:

> "Otherwise, he would be put in the position of being compelled to submit to conversion against his will."

Requested Instruction No. 14B (Tr. 214) is erroneous

because it denies any damages whatever, either by way of interest or usable value or nominal damages. And this despite the admission of unlawful detention during the entire period. And appellant admits (Brief, p. 43) that appellee was entitled to damages equal at least to interest.

Requested Instruction No. 14C was properly denied, because defendant admitted unlawful detention of the property and, therefore, it only remained for the jury to apply the correct measure of damages which has been argued before. Further, the court did instruct upon the necessity for use and a market rental value (Tr. 189-90, 192).

Requested Instruction No. E (Tr. 215) was properly refused because the only period of unlawful detention was between June 4, 1936, and October 15, 1937, and this point was fully covered in the instructions given (Tr. 191). In fact, the substance of all parts of the requested instructions which should have been given were given by the court.

The court did not err as stated in Assignment No. 6, by instructing in the method of determining the reasonable value of the use. The determination of the reasonable rental value is not dependent upon the right of the Operating Company to remove the property as argued by appellant at page 31 of its Brief. We are here proving the usable value and the market value, and the rule by which both are established is not dependent even upon the existence of the property at the time the proof is submitted.

The appellant could have destroyed the property, and yet the rule would remain as stated in said instruction. Appellant concedes removal could have been had with consent of mortgagee and failed to show want of consent, and we have above shown right of removal in any event.

ASSIGNMENT 7 (TR. 216)

Is not properly before this court. If irregular, there was no prejudice to appellant.

We have hereinbefore shown that no objection or exception having been taken to the verdict either before or after return thereof by the jury, this question is not reviewable.

Assignment No. 7 is that the judgment and verdict do not comply with the form required by the Idaho statute. The verdict is set forth in the transcript at page 50, and the statute at page 216. The verdict returned is certain and definite in two respects,—first, it finds in favor of the plaintiff; and second, it assesses plaintiff's damages in the sum of $6730.70. The appellant cannot be injured by the failure of the jury to find the value of the property which would be paid in lieu of the delivery of the property. This would relegate the plaintiff to the property alone, and if it could not be returned then the plaintiff could not take any money under this verdict.

Having found for the plaintiff, it means that the plaintiff is entitled to have possession of the property. The question then arises, what property? The answer is, the

property agreed to be that of the plaintiff, which is the property remaining in the Harvey Inventory after the property of the Ojus Mining Company and that of the owners of the mining claims have been stricken, and this is contained in Exhibit No. 12. There never was any contention throughout the proceedings that the property involved was not that remaining in the Harvey Inventory after deletion, and there is no question concerning the accuracy of the deletion. Therefore, the verdict is understandable, clear and can be enforced as contained in the judgment.

The appellant is inconsistent. It argues that to all intents and purposes and in law it delivered appellee's property to it on October 15, 1937, long before trial, and if that be true then the only statuory condition requiring finding of value, i. e., "if the property has not been delivered to the plaintiff", did not exist, and the verdict was clearly within the terms of the statute. The form of verdict and judgment was not prejudical to appellant, and it points out no injury to it. Hence, even if irregular, appellant cannot complain.

Attention is invited to the case of Blackfoot Stock Co. v.s Delamue, 3 Ida. 291, 29 Pac. 97. This was an action in claim and delivery, in which the defendant claimed redelivery on the ground that he held a lien on the cattle involved. The following verdict was returned:

> "We, the jury in the above entitled action, find that the defendant recover of and from the plaintiff the sum of $679.50 for the keeping and care of the

> cattle mentioned in the complaint, and that defendant have a lien on said cattle until said amount is paid."

In this verdict there is neither a description of the property nor a value placed thereon, but the amount of the lien is fixed as a money judgment against the plaintiff. Upon this verdict a judgment was entered:

> "Wherefore, * * it is ordered, adjudged and decreed that said Andrew Delamue have and recover from said Blackfoot Stock Company the sum of $679.50 * * * and the return and possession of the said cattle mentioned in the complaint * * *".

The Supreme Court of Idaho upheld the verdict and the judgment. And in neither was the property described or the value thereof fixed. This was partly because the parties conceded the ownership of the cattle and the value. In the instant case, the only thing to be determined by the jury was the damages.

It is to be noticed that the appellant limits its objection to the verdict to the single proposition that the same does not find the value of the property detained. As pointed out, this cannot injure the appellant. The appellant accepts the verdict otherwise. (Tr. 216-217).

Conclusion

It is clear from appellant's brief that actually it makes one complaint only—excessive damages— which was neither brought to the attention of the trial court nor assigned as error. It is not contended that the jury rendered its verdict under the influence of passion or prejudice.

Appellant admits that it did a wrong; that it did unlawfully detain a large and valuable quantity of appellee's property; that it should respond in damages more than nominal. It has failed to preserve for review, or to sustain, objections it now makes. It would appear that the appeal was perfected and prosecuted for delay, permitting of the application of the statute. Sec. 878, Title 28 U. S. C.

> "Where, upon a writ of error, judgment is affirmed in a Circuit Court of Appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

And rule 30 (2) of this court.

Appellant can claim no equitable consideration or mitigation. It had the inventory of such of the property on the premises as belonged to it; it knew that appellee had operated the mines and was entitled to large quantities of the property; it admits unlawful detention and damage, yet its claim that such detention ceased October 15, 1937, is based not on an offer to return any specific property claimed but only generally such property as appellee could convince appellant was owned— a source of further controversy and litigation—and unaccompanied with any tender of payment of admitted damage for its unlawful detention of over one year. In line with a policy of escaping liability for its acts by unlawfully doing business and holding title to realty in Idaho under the name of an employee, Alexander Lewis, it sought to escape jurisdiction of the court in Idaho, and by every means to escape re-

sponding in damage for its admitted wrong, and now appeals upon unreviewable or shallow grounds.

A review of the record indicates that the jury took all matters into consideration and accepted the agreement of all parties that the property was unlawfully detained between June 4, 1936 and October 15, 1937; that the property involved was what remained in the Harvey Inventory after eliminating the property of the Ojus Mining Company and the owners of the claims; and upon the evidence concluded that the damages which the plaintiff had sustained was not the sum of $18,460.64 claimed by plaintiff, nor the sum of $15,196.64 determined by deducting from plaintiff's claim the amounts testified to by the defendant, but was the sum of $6,730.70.

This clearly indicates full consideration was given by the jury to all evidence respecting the character of the property involved, the rental value of the same, the fact that all of the property was not appraised, the fact that there is no evidence respecting the rental value of all of the property detained but merely of a part of the property, the fact that the defendant first denied all unlawful detention and claimed a forfeiture of the property and finally admitted liability, the fact that the defendant never offered any property to the plaintiff unequivocally, but merely said, "come get what you can prove", the fact that the property was detained without reason for appellant's development purposes and without opportunity to appellee to appear upon the property to aid in a sale thereof.

To review the assigned errors we repeat, respecting assignments Nos. 1 and 2, the record is not certified to this court and can not be reviewed. Respecting assignment No. 3, the evidence offered, the chattel mortgage and the assignment thereof, was without foundation for want of the debt, and was also immaterial and irrelevant. Respecting assignment No. 4, the sufficiency of the evidence cannot be reviewed for want of a motion for instructed or directed verdict, and any other motion by appellant to bring the matter to the attention of the court below. Respecting assignments Nos. 5 and 6, the record is silent, both as to a request for instructions or any objection to the instructions given, and the same cannot be called to the attention of this court for the first time on appeal. Respecting assignment No. 7, the verdict is not reviewable for want of objection at the trial, and does not injure the appellant, nor is the same uncertain for the assigned reason that it does not contain the value of the property involved, or for any other reason.

Respectfully submitted,

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W. H. Langroise

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Erle H. Casterlin

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Sam S. Griffin

ATTORNEYS FOR APPELLEE
Residence: Boise, Idaho